IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

WP(C).No. 8754 of 2006(P)

PETITIONER:

M.J. SAJEEV, HIGHER SECONDARY
SCHOOL TEACHER, ST.JOHN'S MODEL HIGHER
SECONDARY SCHOOL, NALANCHIRA, THIRUVANANTHAPURAM.

BY ADV. SRI.PIRAPPANCODE V.S.SUDHIR
SRI.V.VARGHESE

RESPONDENTS:

---

1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT, GENERAL EDUCATION
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF HIGHER SECONDARY
EDUCATION, HOUSING BOARD BUILDING,
SANTHI NAGAR, THIRUVANANTHAPURAM.

3. THE CORPORATE MANAGER, MALANKARA SYRIAN
CATHOLIC SCHOOLS, PATTOM, THIRUVANANTHAPURAM.

BY ADV. SRI.V.M.KURIAN
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS
SR.GOVERNMENT PLEADER SMT. M.R. SREELATHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/10/2007,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

EXT.P1: COPY OF G.O.(MS)NO.162/98/G.EDN. DATED 13.5.98.

EXT.P2: COPY OF G.O.(MS)NO.298/2000/G.EDN. DATED 25.8.2000.

EXT.P3: COPY OF JUDGMENT OF THIS HON'BLE COURT IN O.P. NO.25787/2000-T.

EXT.P4: COPY OF THE ACD.B1/17957/2000 25.10.2000 OF THE 2ND RESPONDENT.

EXT.P5: COPY OF THE APPOINTMENT ORDER NO.HSS/2437/2002 DATED 13.11.2002.

EXT.P6: COPY OF THE ORDER NO.ACD.B5/4110/02/HSE DATED 17.3.2004 OF THE 2ND RESPONDENT.

EXT.P7: COPY OF THE G.O.(RT)NO.5124/2004 G.EDN. DATED 30.11.2004.

EXT.P8: COPY OF THE JUDGMENT OF THISHON'BLE COURT IN W.P.(C)NO.3628/2005-F.

EXT.P9: COPY OF THE ORDER DATED 21.11.2005 IN R.P.NO.876/2005 IN W.P.(C)NO.3628/2005 ON THE FILED OF THIS HON'BLE COURT.

EXT.P10: COPY OF THE ORDER NO.ACD.B5/4119/2002/HSE DATED 27.11.2002 OF THE 2ND RESPONDENT.

EXT.P11: COPY OF THE G.O.(MS)NO.351/2004/G.EDN. DATED 20.11.2004.

EXT.P12: COPY OF THE ORDER NO.ACD.B5/26307/HSE/2005 DATED 25.1.2006 OF THE 2ND RESPONDENT.

EXT.P13: COPY OF G.O.(MS)NO.466/05/G.EDN. DATED 31.12.2005.

EXT.P14: COPY OF ANNEXURE B1 TO EXT.P13.

EXT.P15: COPY OF THE G.O.(MS)NO.398/2002/G.EDN. DATED 29.11.2002.

EXT.P16: COPY OF THE TIME TABLE SHOWING THE WORK LOAN FOR THE YEAR 2002-03 OF THE PETITIONER.

EXT.P17: COPY OF THE G.O.(MS)NO.91/2007/G.EDN. DATED 7.5.2007.

TRUE COPY

PA TO JUDGE.

S. SIRI JAGAN, J.

W.P.(C)No. 8754 OF 2006

Dated this the 28th day of September, 2007

JUDGMENT

The petitioner is presently working as a Higher Secondary School Teacher (Junior) in Malayalam who was appointed by transfer from among HSAs. Pursuant to Ext.P5 appointment order issued by the 3rd respondent, the petitioner was appointed as Higher Secondary School Teacher but the same was approved, by Ext.P6, only as Higher Secondary School Teacher (Junior). Earlier, pursuant to notification invited by the 3rd respondent Manager for appointment to three posts of Higher Secondary School Teacher (Malayalam) by transfer from among High School Assistants, the petitioner also applied. After the selection, a rank list was prepared in which the petitioner was the 4th candidate. The 3rd respondent appointed the first three in the three vacancies available. The petitioner challenged the rank list on the ground that he should have been the first in the rank list. Even after several rounds of litigation the petitioner could not succeed. The final order in this regard is Ext.P4, rejecting the

claim of the petitioner. However, by Ext.P4, the petitioner was given some benefits in the matter of appointment to future vacancies. The validity of the rank list was for the period from 1.9.2000 to 31.8.2001. By Ext.P4 order the 2nd respondent held as follows:

> "However, being the next candidate (NO.4) in the Rank List, the petitioner has got legitimate claim for appointment in the vacancy, if any, that arises during the period of the validity of the list. The Manager is directed to consider his claim in fairness and accordance with rules, at the appropriate time."

However, before 31st August 2001 the petitioner was not appointed.

2. The petitioner's contention is that in fact there was a vacancy to which the petitioner ought to have been appointed by the 3rd respondent, as per the above direction in Ext.P4. Subsequently staff fixation order was passed by the 2nd respondent which is Ext.P10. In fact a post of Higher Secondary School Teacher in Malayalam was sanctioned for the year 2001-02 as per Ext.P10 dated 27.11.02 which post was available with effect from 15.7.2001. However, as said earlier,

the petitioner was not appointed to that post. The petitioner was appointed by Ext.P5 dated 13.11.02 but the appointment was approved by Ext.P6 only as Higher Secondary School Teacher (Junior). Of course, the petitioner thereafter embarked on a litigation claiming appointment as Higher Secondary School Teacher but he ultimately lost the battle and did not take up the matter further.

3. Subsequently, the Government passed Ext.P11 order, by which it was ordered that the benefit of full time scale of pay would be granted to aided Higher Secondary School Teachers appointed by transfer from among qualified High School/Upper Primary School/L.P. School Assistants, irrespective of the periods of teaching available for the subject, as in the case of Government Higher Secondary Schools as ordered in G.O.(MS)No.162/98/G.Edn. dated 13.5.1998. But it was stipulated therein that the said benefit would not be applicable to those who were appointed under the provisions of the special rules after 12.11.01. Now the petitioner contends that he is eligible for the benefits of Ext.P11, since by virtue of Ext.P4 order he should have been appointed during the period

from 15.7.01 to 14.7.02 in the vacancy which arose on 15.7.01 as evidence by Ext.P10 staff fixation order. If the petitioner was thus eligible for such appointment, his appointment would relate back to that date, which would be before 12.11.01 and the petitioner would consequently become eligible for the benefit of Ext.P11 order is the contention raised. On these averments the petitioner seeks the following reliefs:

> "i) issue a writ of certiorari or any other appropriate writ, order or direction calling for the records leading to Ext.P12 and quash the same.
>
> ii) Declare that the petitioner is entitled to the salary attached to the Full Time Post of HSST on the basis of Ext.P11 read with Exts.P10 and P4.
>
> iii) issue a writ of mandamus or any other appropriate writ, order or direction commanding the respondents to suitably modify the date of appointment of the petitioner so as to enable him to enjoy the benefits conferred by Ext.P11 on the strength of Exts.P4 and P11 from the date of occurrence of vacancy.
>
> iv) direct the respondents to grant the petitioner salary and allowances attached to Full Time post of HSST with retrospective effect with all attendant consequential benefits including arrears of salary with effect from the date of occurrence of vacancy".

4. The 3rd respondent, with the help of his counter affidavit, would contend that the petitioner is not entitled to the reliefs prayed for. According to him, the petitioner has embarked on several litigation claiming appointment as Higher Secondary School Teacher with effect from an anterior date which he lost and therefore he cannot be heard to contend that he should have been appointed with effect from an earlier date so as to enable him to get benefits of Ext.P11. He would submit that he could not have validly appointed to the petitioner in the post which was available by virtue of Ext.P10 staff fixation order at all. The contention is that at the relevant time of appointments of Higher Secondary School Teachers were to be regulated by the directions of the Supreme Court in **M.M. DOLICHAN AND OTHERS VS. STATE OF KERALA AND OTHERS [(2001) 1 Supreme Court Cases 151]** in which the Supreme Court had imposed a ban on any appointment till special rules prescribing the qualifications of the Higher Secondary School Teachers were framed by the Government. The Court directed that there shall be no further appointments of Higher Secondary School

Teachers from any source, either in the private school or in the Government schools from the date of the judgment for a period of three months. The date of judgment is 14.11.2000. He would submit that in the same judgment the Court had specifically directed that if for any unforeseen circumstances the statutory rules could be notified and brought in to force within the said period of 3 months and if there was any necessity for immediate recruitment of teachers it would be open for the parties to move the Supreme Court for appropriate direction. He would further submit that pursuant to a Division Bench judgment of this Court in the matter the Government was not permitting any management to make regular appointments of Higher Secondary School teachers and were only permitting appointments of Guest Lecturers in the available vacancies pending framing of special rules. Therefore, the management was legally prevented from making any appointments till the special rules were framed on 12.11.2001. The contention is that by that time, the validity of the rank list expired on 31.8.01 and therefore the direction in Ext.P4 to consider the claim of the petitioner for

appointment within the period of validity of the rank list lost all relevance. As and when the 3rd respondent could make appointments validly, the petitioner was appointed by Ext.P5 order. On these contentions the 3rd respondent would submit that the petitioner could not have been validly appointed pursuant to Ext.P4 order and therefore the petitioner cannot claim any benefit whatsoever, on the ground that the petitioner should have been appointed before 31.8.2001 pursuant to Ext.P4 order in the vacancy which was available as evident from Ext.P10 staff fixation order.

6. The 2nd respondent Director of Higher Secondary Education has also filed a counter affidavit in which they have stated that in view of the fact that the petitioner's appointment was approved only by Ext.P6 as a Higher Secondary School Teacher (Junior) with effect from 18.11.02, he cannot claim any benefit on the basis of Ext.P11.

7. I have considered the rival contentions in detail. The only question arising for consideration in this case is as to whether the manager could have validly appointed the petitioner as a Higher Secondary School Teacher in the

vacancy evidenced by Ext.P10 staff fixation order during the validity of the rank list from 1.9.2000 to 31.8.2001 as directed in Ext.P4. Ext.P4 has not been subjected to challenge by the 3rd respondent, although the petitioner challenged the same and lost. That being so, Ext.P4 has become final. Therefore, the entitlement of the petitioner for benefits arising from Ext.P4, if available cannot be disputed now. But still it has to be decided as to whether the petitioner was entitled to be appointed pursuant to Ext.P4 prior to 31.8.2001, which is the date on which the validity of the rank list expired.

8. According to the petitioner, the 3rdrespondent ought to have appointed the petitioner in the vacancy which arose on 15.7.01 since in **Dolichan's case** the ban of the Division Bench was only for a period of three months from 14.11.2000. He would further submit that even otherwise the Division Bench had ratified all appointments made during the relevant period even against the ban order and therefore the 3rd respondent ought to have appointed the petitioner in the vacancy available.

9. I am not able to countenance the contentions of the petitioner. In fact the petitioner is inviting me to hold that the manager ought to have committed an illegality by appointing the petitioner as claimed by him. The fact that subsequently the illegality committed by similarly placed managers has been ratified by the Division Bench is beside the point and that cannot regulate the conduct of the 3rd respondent manager in this matter. The only question is as to whether under law the manager could have appointed the petitioner validly at the relevant time.

10. Of course the petitioner would contend that the manager himself had earlier made appointment of one Sri. Jomy T.T. during the relevant period. He points out that in Ext.P7 it has been specifically held that the said Sri. Jomy was holding the post from 15.7.01 and therefore the appointment was made on 15.7.01 which was during the ban period. But the learned counsel for the 3rd respondent points out that the said Sri. Jomy T.T. was not appointed on 15.7.01. His appointment was only approved with effect from 15.7.01. He would further point out that the said Jomy was appointed

pursuant to the interview held on 25.8.2000 as is evident from Ext.P4 itself.

11. I am inclined to accept the explanation furnished by the learned counsel for the 3rd respondent since in Ext.P4 itself, it is stated that the interview of the said Jomy which was along with that of the petitioner on 25.8.2000 and appointments were given to three persons including the said Jomy. That being so, I cannot hold that the manager had in fact appointed any other person during the period in question as contended by the petitioner.

12. Of course, the petitioner points out that the 3rd respondent had made appointments of guest lecturer during the said period which would go to show that there was in fact a vacancy. The 3rd respondent contradicts the same and states that the appointment of guest lecturer was only pending finalization of the special rules as directed by the Government in the Government orders in question which the petitioner could not dispute. In such circumstances, I am unable to hold that that the 3rd respondent manager could have validly appointed the petitioner before 31.8.01 as directed in Ext.P4.

13. In view of the circumstances mentioned above which prevented the 3rd respondent from making any appointments during the period in question, I cannot hold that the petitioner could have been validly appointed before 31.8.2001 as contended by him. As such the directions in Ext.P4 loose all relevance also. Therefore, the petitioner would not be entitled to the benefit of Ext.P11 Government order also. .

In the above circumstances, I am satisfied that the petitioner is not entitled to any reliefs in this writ petition and accordingly the same is dismissed.

S. SIRI JAGAN, JUDGE

Acd